(1) Supreme Court, U.S.

00-1380 MAR - 5 2001

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No. _____

In The

Supreme Court of the United States

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, INC., *et al.*,

Petitioners,

v.

MURPHY J. FOSTER, JR., GOVERNOR, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of the doctrine of "virtual representation" to bar plaintiffs who opt out of a state court class action from maintaining their separate federal court constitutional challenge to a state statute denies due process of law.

LIST OF PARTIES

Petitioners: Louisiana Seafood Management Council, Inc., John Thompson, Eddie Lejuine, Matthew Regan, Clara Gerica, Barry Schaferkotter, Peter Steven Hotoph, Eugene Hickman, Chad Lay, Lindberg Santini, Ned F. Malley, Jr., Barish, Inc.

Parent Companies and Subsidiaries: None.

Respondents: Murphy J. Foster, Jr., Governor, Richard P. Ieyoub, Attorney General, Joe Herring, Charles Clark, Peter Vujnovich, John F. Schneider, Peter Gisclair, Daniel Babin, Joseph P. Cormier, Glynn Carver, Wynton Vidrine, Louisiana Wildlife and Fisheries Comm'n, Louisiana Department of Wildlife & Fisheries.

Intervenor/Respondent: Coastal Conservation Association d/b/a Gulf Coast Conservation Ass'n of Louisiana.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Louisiana Seafood Management Council, Inc., *et al.*, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, No. 99-30790, lately entered in this matter on December 11, 2000.

OPINIONS BELOW

The December 11, 2000 opinion of the Fifth Circuit Court of Appeals is unreported and is reprinted herein, Appendix, 1a, *infra*. The April 20, 1999 opinion of the district court is reported at 46 F. Supp.2d 533 (E.D. La. 1999) and is reprinted herein, 3a, *infra*. The June 24, 1999 opinion of the district court is reported at 53 F. Supp.2d 872 (E.D. La. 1999) and is reprinted herein, 34a, *infra*.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on December 11, 2000. Rehearing was denied on January 9, 2001, 64a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Refusing defendants' plea to abstain,[1] the district court issued a preliminary injunction against enforcement of the Louisiana Marine Resources Conservation Act's ban on commercial but not recreational weekend fishing: "No viable conservation objective can be accomplished by prohibiting commercial fishermen from weekends but allowing recreational fishermen exclusive access to a public resource. Both categories of fishermen can pose a threat to marine resources and there is no conservation reason to support the ban of only one on weekends." *Louisiana Seafood Management Council v. Foster*, 917 F. Supp. 439, 445 (E.D. La. 1996) (footnote omitted). This was the federal court's conclusion under the Commerce Clause.[2] Thereafter, the district court stayed the federal suit pending disposition in state court.[3] Said the district

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[1] The federal court stated: "Although you suggest in your memo this situation may be artful drafting of pleadings to substitute different parties with identical issues, this Court does not see this situation as being as you suggest." Oral Reasons, 1/18/96, Record on Appeal, Vol. 5, p. 16. "I believe what I have actually before me is a situation that is more akin to duplicative litigation as opposed to piecemeal." *Id.* "Accordingly . . . finding that there are substantial questions of federal law involved in this particular situation, the Court hereby denies your motion to dismiss." *Id.*

[2] Neither the state trial court nor the Louisiana First Circuit Court of Appeal addressed the federal district court's Commerce Clause condemnation of Act 1316's ban of weekend commercial fishing.

[3] The state trial court found as a fact that "Act 1316 eliminated the use of gill nets in state waters. *This previously legal method of harvesting fish was declared illegal without any supporting biological data showing that the gill nets were damaging a*

court: "IT IS ORDERED that plaintiffs may file to reopen this case when a final decision is reached in the state court proceedings." *Louisiana Seafood Management Council v. Foster*, 926 F. Supp. 579, 582 (E.D. La. 1996).

The federal suit was filed on January 11, 1996 while the state court litigation was pending and more than a year before the state trial court's final judgment of February 18, 1997. When the federal suit was filed there was neither a request nor an order for class certification in the state court proceedings. Only in the state trial court's final judgment of February 18, 1997 did it order class certification. The record shows conclusively that no notice of such class certification was ever afforded to non-party class members, including the instant federal plaintiffs, nor did the state trial court specify the classes

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particular species of fish." Louisiana Seafood Management Council v. Louisiana Wildlife and Fisheries Comm'n, 715 So.2d 387, 390 (La. 1998) (emphasis in original). "We recognize that Act 1316 has had a tremendous impact on the availability of saltwater finfish for markets both within the state of Louisiana and beyond the state's borders," said the First Circuit Court of Appeal, but it rejected state plaintiffs' Commerce Clause challenge saying, "This incidental burden on interstate commerce merely reflects the Louisiana Legislature's response to the depletion of saltwater finfish in the waters of Louisiana." *LA Seafood Management v. LA Wildlife*, 719 So.2d 119, 127, 128 (La. App. 1st Cir. 1998). Nothing in the state court record, which includes all testimony presented at legislative hearings on the bill, supports this factual assertion. The Secretary of the Department of Wildlife and Fisheries, Joe Herring, testified before the state trial court, "[B]ut the present rate that we're going with the present laws in effect that the fish resource has been increasing." State Rec. p. 1020.

to be included in the putative state court class action. Rec. Doc. # 70, Rec. p. 988.[4]

Two of the federal plaintiffs, Louisiana Seafood Management Council and Peter Steven Hotoph, were named parties in the state suit, but nothing in the state or federal court records shows that Louisiana Seafood Management Council sued in a representative capacity or was authorized or legally responsible to represent the federal plaintiffs who were not parties to the state court suit. Clara Gerica, a fisherwoman and one of the non-state party federal plaintiffs, affirmed in her uncontradicted affidavit of record: "That affiant, at all time material hereto, is not a member of any group or association named as a party plaintiff in the state court proceeding"; "That affiant chose not to be a plaintiff in the state litigation"; "That affiant opted out of the state court litigation"; "That affiant chose to litigate in this federal court litigation." Rec. p. 995.

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[4] The minutes of the state trial court for February 12, 1996 show that after the trial court granted certification for class action, "the Court informed the parties that Class Specification will be outlined in writing by the Court and/or faxed to all parties by the close of business, Tuesday, February 13, 1996. Judgment to be signed accordingly." Rec. p. 988. Only in the trial court's final judgment on the merits of February 18, *1997, more than a year later,* did it order class certification and specify its composition. On February 25, 1997, after entering a judgment on the merits and ordering class certification, the trial court signed an order setting a hearing on Plaintiffs' Motion to Define Class for *April 28, 1997.* Thereafter, defendants secured an order for a suspensive appeal, signed by the trial court on February 28, 1997, which aborted the scheduled April 28, 1997 class definition hearing. Rec. p. 988.

Ultimately, the district court dismissed the federal plaintiffs' civil rights complaint on res judicata grounds, holding that an adverse judgment in state court proceedings involving the same federal constitutional challenges to the Louisiana Marine Resources Conservation Act of 1995 barred the new federal parties from pursuing their own constitutional claims filed in federal court before the state court final judgment.

The district court, applying the Eighth Circuit's broad theory of "virtual representation" set forth in *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), held that the non-state party federal plaintiffs' interests were adequately represented in the state court proceedings. The district court predicted that, under the same theory of virtual representation, Louisiana law would foreclose the non-state party federal plaintiffs from litigating in federal court. The district court rejected the non-state party federal plaintiffs' claim that due process permits them to litigate their constitutional claims in federal court and that they had properly opted out of any state class action under Louisiana law by filing a separate suit in federal court. The district court found that the non-state party federal plaintiffs' "acquiescence to the preclusive effect of the state court suit can be implied from conduct and manifestations of intention." 60a-61a, *infra*. The Fifth Circuit affirmed, per curiam, adopting the district court's reasoning.

REASONS FOR GRANTING THE WRIT

The due process question presented is substantial. The federal circuit courts of appeals are split on the cloudy contours of the "virtual representation" doctrine and its due process implications.[5] The United States Supreme Court of late, *Richards v. Jefferson County*, 517 U.S. 793 (1996), *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and the Fifth Circuit itself in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978), and *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987), have voiced the same concerns of due process – "the day-in court ideal" – urged by the non-state party federal plaintiffs below. Louisiana's res judicata law is *strict juris* on the same due process grounds.

1. The district court's decision, *aff'm per curiam* by the panel, is pegged on application of the Eighth Circuit's broad theory of "virtual representation,"[6] which is in

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[5] "Although the Fifth Circuit officially introduced the modern doctrine of virtual representation, it, more than any other circuit, has recognized the illegitimacy of basing virtual representation entirely on an identical-interest notion of adequate representation." Comment, Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim," 68 Tulane L. Rev. 1303, 1335 n.197 (1994).

[6] *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997). "[I]t should not be surprising that the Court of Appeals for the Eighth Circuit would disfavor the *Richards* opinion, given that the judges of that court advocate a 'liberal' interpretation of the doctrine of virtual representation. However, not only is the *Tyus* court's use of the term 'virtual representation' inconsistent with that of the United States Supreme Court's interpretation, but the circuit court's

conflict with the due process reasoning of the Seventh Circuit, *Tice v. American Airlines*, 162 F.3d 966 (7th Cir. 1998); the Sixth Circuit, *Bittinger v. Tecumseh Products Company*, 123 F.3d 877 (6th Cir. 1997), *Bercherer v. Merrill Lynch*, 193 F.3d 415 (6th Cir. 1999) (*on rehearing en banc*); the Third Circuit, *Collins v. E.I. Dupont De Nemours & Co.*, 34 F.3d 172 (3rd Cir. 1994); the First Circuit, *Gonzales v. Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994); and the Ninth Circuit, *Besinga v. U.S.*, 923 F.2d 133 (9th Cir. 1991). Each of these circuits has insisted on the due process requirement of notice to non-parties and an opportunity to opt out of any putative class action in order to assure them their day in court. This is also the teaching of *Ortiz v. Fibreboard Corp.*, 527 U.S., at ___, 119 S.Ct. 2295, 2315 (1999), *viz.*: "But we also saw that before an absent class member's right of action was extinguishable due process required that the member 'receive notice plus an opportunity to be heard and participate in the litigation,' and we said that 'at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class.' " (Quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). *Accord, Ford v. Murphy Oil U.S.A., Inc.*, 703 So.2d 542, 544 (La. 1997), *viz.*: "The purpose and intent of class action procedure is to adjudicate and obtain *res judicata* effect on all common issues applicable not only to the representatives who bring the action, but to all others who are 'similarly situated,' *provided they are*

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reasoning is wholly inconsistent with the Supreme Court's holding in *Richards*, which condemns 'extreme applications' of res judicata." R. Jason Richards, *Richards v. Jefferson County*: The Supreme Court Trims the Crimson Tide of Res Judicata, 38 Santa Clara L. Rev. 691, 740 (1998).

given adequate notice of the pending class action and do not timely exercise the option of exclusion from the class action." (Emphasis added.) As early as 1979, the Fifth Circuit said the same thing: "Without valid notice and an opportunity to opt out of the class, there can be no *res judicata* effect given to judicial determinations of the claims of unrepresented parties." *Jones v. Diamond*, 594 F.2d 997, 1023 (5th Cir. 1979). "In their complaint the plaintiffs apparently sought the certification of both a (b)(2) and a (b)(3) class, but there is no indication in the certification order as to what type of class action the Judge had certified. There is also no indication in the record that the class members were properly notified, and we cannot assume that they were." *Id.* Again, "[N]or did the Case One court make any special effort 'to protect the interests' of the Case Two plaintiffs." *South Central Bell Telephone Co. v. Alabama*, 526 U.S., at 167, quoting *Richards v. Jefferson County*, 517 U.S. 793, 802 (1996).

2. The district court below acknowledged that "this Court must apply the doctrine of res judicata as delineated by Louisiana law," 17a n.6, *infra*. Louisiana law as voiced by Justice Albert Tate, Jr., a due process guardian of extraordinary capacity, has always afforded a due process opportunity to opt out of any putative class action. *Williams v. State*, 350 So.2d 131 (La. 1977). La. Code Civil Procedure, Art. 592(B)(1) (notice and "an option to be excluded from the class"). Indeed under Louisiana law, by filing their own suit in federal court, the non-state party plaintiffs here "presumably opted out of the class action." *Williams v. State*, 350 So.2d at 138. *Accord, In re Corrigated Container Antitrust Litigation*, 756 F.2d 411, 418-419 (5th Cir. 1985) ("An opt-out plaintiff is not a party

to the class action and is not bound by the class action judgment.") (per Politz, J.); *Collins v. E.I. Dupont De Nemours & Co.*, 34 F.3d 172, 180 (3rd Cir. 1992) ("By not joining the earlier lawsuit, he in essence opted for his own day in court."); *Bercherer v. Merrill Lynch*, 193 F.3d 415, 425 (6th Cir. 1999) ("Due process concerns mandate the opt-out mechanism.").

The district court below further opined that "the doctrine of 'virtual representation' would most probably be viewed as a suitable doctrine by the state courts of Louisiana." 17a n.6, *infra*. To the contrary, Louisiana courts have insisted on the same strict confines to application of the doctrine of "virtual representation" as the Fifth Circuit has voiced in the past. *Condrey v. Howard*, 679 So.2d 563 (La. App. 2d Cir. 1996), *writ denied*, 683 So.2d 281 (La. 1996); *Gilbert v. Visone*, 708 So.2d 496 (La. App. 2d Cir. 1998). Both *Condrey* and *Gilbert* follow the Fifth Circuit's narrow view of "virtual representation" previously expressed in *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172 (5th Cir. 1987). "The question of virtual representation is to be kept within 'strict confines.' " *Meza v. General Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990). "This requires more than a showing of parallel interests – it is not enough that the non-party may be interested in the same questions or proving the same facts." *Gulf Island-IV v. Blue Streak-Gulf Is Ops*, 24 F.3d 743, 747 (5th Cir. 1994). *Accord, Hudson v. City of Bossier*, 766 So.2d 738, 743 (La. App. 2d Cir. 2000) ("The concepts of control and virtual representation are narrowly construed and are not satisfied merely by showing that the party and the nonparty have common or parallel

interests in the factual and legal issues presented in the respective actions.").

3. All that is left then of the district court's reasoning is its statement: "[A]cquiescence to the preclusive effect of the state court suit can be implied from conduct and manifestations of intention." 60a-61a. Quite the contrary, "the fact that the [federal] plaintiffs never consented, either explicitly or constructively, to be bound by the verdict in the earlier action is significant, *see Benson & Ford*, 833 F.2d at 1156, *especially since they actually initiated the later action while the earlier action was still pending.*" *Gonzales v. Banco Cent. Corp.*, 27 F.3d 751, 762 (1st Cir. 1994) (emphasis added). "The only acceptable indicator of the [federal] plaintiffs' acquiescence or lack thereof lies in their decision to opt out and file a case in [federal] court." *Bercherer v. Merrill Lynch*, 193 F.3d 415, 428 (6th Cir. 1999).

As to Clara Gerica's conduct, she and other non-state party plaintiffs brought their own suit in federal court seeking Article III determination of their constitutional claims while the state suit was still pending. They are entitled to do so. "[I]t is their option whether to invoke the jurisdiction of the federal courts or the state courts." *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978). The state court proceedings now at an end are "an inadequate substitute for the initial District Court determination . . . to which the litigant is entitled in the federal courts." *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 416 (1964). As to Clara Gerica's manifestations of intention, her uncontradicted affidavit swears: "That affiant, at all time material hereto, is *not* a member of any group or association named as a party in

the state court proceeding. . . . " "That affiant *chose not to be a plaintiff in the state litigation.*" "That affiant *opted out of the state court litigation*"; and, "That affiant *chose to litigate in this federal court litigation.*" Affidavit of Clara Gerica, Rec. p. 995 (emphasis added).

CONCLUSION

For the foregoing reasons, certiorari should be granted.

Respectfully submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30790

LOUISIANA SEAFOOD MANAGEMENT COUNCIL, INC.; JOHN THOMPSON; EDDIE LEJUINE; MATTHEW REAGAN; CLARA GERICA; TODD STIPELCOVICH; BARRY SCHAFERKOTTER; DAVID MILLS; CHRISTON CHERAMIE; PETER STEVEN HOTOPH; EUGENE HICKMAN; CHAD LAY; LINDBERG SANTINI; NED F. MALLEY, JR.; AND BARISICH, INC.,

Plaintiffs-Appellants,

VERSUS

MURPHY J. FOSTER, JR., GOVERNOR; RICHARD P. IEYOUB, ATTORNEY GENERAL; JOE HERRING; CHARLES CLARK; PETER VUJNOVICH; JOHN F. SCHNEIDER; PETTY GISCLAIR; DANIEL BABIN; JOSEPH P. CORMIER; GLYNN CARVER; WYNTON VIDRINE; LOUISIANA WILDLIFE AND FISHERIES COMMISSION; AND LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana

(Filed Dec. 11, 2000)

Before POLITZ, SMITH, and PARKER, Circuit Judges.

PER CURIAM:*

The plaintiffs challenge a state statute. In a comprehensive opinion, the district court dismissed the complaint as barred by the doctrine of res judicata.

We have reviewed the briefs and applicable law and pertinent portions of the record and have heard the arguments of counsel. We agree with the district court's persuasive reasoning, and we affirm, essentially for the reasons stated by the district court, with the exception of its discussion of judicial estoppel, which was not necessary to the result.

AFFIRMED.

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

LOUISIANA SEAFOOD MANAGEMENT, et al.

v.

FOSTER, et al.

No. Civ.A. 96-106.

United States District Court,
E.D. Louisiana.

April 20, 1999.

Paul R. Baier, Baton Rouge, LA, Robert A. Barnett, Guste, Barnett & Shushan, LLP, New Orleans, LA, for Louisiana Seafood Management Council, Inc., John E Thompson, Eddie Lejuine, Matthew Reagan, Clara Gerica, Todd Stipelcovich, Barry Schaferkotter, David A Mills, Christon Cheramie, Peter Steven Hotoph, Eugene Hickman, Chad Lay, Lindberg Santini, Ned F. Malley, Jr, Barisich Inc., plaintiffs.

Judith Ruth Atkinson, Thomas E. Balhoff, Roedel, Parsons, Koch, Frost, Balhoff & McCollister, Baton Rouge, LA, for Coastal Conservation, dba, Gulf Coast Conservation Association of Louisiana, intervenor-plaintiff.

Edmond W. Shows, Shows, Cohn & Cali, Baton Rouge, LA, Frederick Coller Whitrock, Louisiana Department of Justice, Public Protection Division, Baton Rouge, LA, Thomas Michael Landrum, Donald E. Puckett, Laura Heap, Louisiana Department of Wildlife and Fisheries, Baton Rouge, LA, Ronnie J. Berthelot, Shows, Cali & Burns, Baton Rouge, LA, for Murphy J. Foster, Jr., Richard P. Ieyoub, Attorney General, Joe L. Herring, Peter Vujnovich, John P. Schneider, Perry Gisclair, Daniel Babin,

Joseph P. Cormier, Glynn Carver, Wynton Vidrine, Louisiana Wildlife and Fisheries Commission, Louisiana Department Wildlife and Fisheries, defendants.

Edmond W. Shows, Shows, Cohn & Cali, Baton Rouge, LA, Frederick Coller Whitrock, Louisiana Department of Justice, Public Protection Division, Baton Rouge, LA, Donald E. Puckett, Laura Heap, Louisiana Department of Wildlife and Fisheries, Baton Rouge, LA, Ronnie J. Berthelot, Shows, Cali & Burns, Baton Rouge, LA, for Charles – Clark, defendant.

PORTEOUS, District Judge.

This matter came for hearing upon motions previously set for hearing by both the plaintiffs and the defendants, seeking this Court to act in this case following a definitive ruling by the state courts of Louisiana on a state action which had formerly required this Court to enter an abstention order. The plaintiffs have come forward requesting that this Court remove the stay currently imposed on this federal action so that the merits of this case can be addressed. The defendants have countered, claiming in their motion to dismiss that if the Court was to lift the stay, then the stay should be lifted only to dismiss this case pursuant to the preclusive effect of a state court judgment. Oral arguments were entertained, after which the Court took this matter under submission. The Court, having reviewed the record, the applicable law, and the memoranda of the parties, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. FACTUAL BACKGROUND

This suit involves a challenge by the commercial fisherman to Act 1316 of the 1995 Louisiana Regular Session (hereinafter, the " 'gill-net ban' law"). The Act, after a two-year phase-out period, banned entanglement nets (hereinafter, "gill-nets") as a form of gear for catching fish in salt water areas of Louisiana. This ban applies in most instances, although gill-nets may still be used to catch mullet and pompano, as well as certain other species under certain circumstances.

The history of this Act and its effects have been well chronicled in the records of this federal court and in those of the state courts of Louisiana. This Court will not reiterate the history at this time. Furthermore, the convoluted procedural history and facts of this case will not be elaborated upon any more than necessary.

Basically, certain named plaintiffs filed suit in a state court of Louisiana on August 14, 1995 seeking declaratory and injunctive relief to block the implementation of the "gill-net ban" law. These plaintiffs represented that they were a "group of licensed commercial saltwater fisherman, their associations, allied commercial seafood marketing interests, wholesalers, retailers, restauranteurs, and seafood consumers." Moreover, plaintiffs prayed for certification of this suit as a class action.[1] The plaintiffs

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[1] The Louisiana state court eventually certified the class as "commercial fisherman who were either licensed or permitted to fish commercially when Act 1316 went into effect" in the court's judgment dated February 18, 1997.

made various federal constitutional and state law arguments against the "gill-net ban" law. The plaintiffs' request for a preliminary injunction was denied by the state court in September of 1995.

Subsequent to the ruling of the state court on the preliminary injunction request, this suit was filed in this federal Court on January 11, 1996. Louisiana Seafood Management Council was listed as the lead plaintiff in the federal suit as well as the state court suit. Steve Hotoph was also listed as a named plaintiff in both suits. The other named plaintiffs in the federal suit all appear to have some connection with the named plaintiffs in the state court suit, either as probable members of the certified state class or as members or officers of certain commercial fisherman associations named in the first suit. The legal issue of whether these plaintiffs can be seen as the same group (*i.e.*, "identity of parties") will be discussed at length later.

After the federal suit was initiated, the state court held a hearing on plaintiffs' request for a permanent injunction on February 27, 1996. While this Court had already addressed some of the merits of this case after holding its own preliminary injunction hearing, another hearing was scheduled to take place in this Court. This hearing was to occur before the state court had a chance to rule on the permanent injunction request. Basing its decision to stay the federal proceedings on the Pullman Abstention Doctrine, this Court stated as follows:

> There is no reason for the Court to believe that abstention in this case will cause any of the parties undue delay or expense. In fact, this Court believes that it may be a waste of judicial

> and counsel's resources to conduct another permanent injunction trial calling substantially the same witnesses and debating substantially the same issues when at any time the state court may render a decision making the entire trial moot.

Louisiana Seafood Mngt. Council, Inc., et al. v. Foster, et al., 926 F.Supp. 579, 582 (E.D.La.1996). Accordingly, this Court abstained so that the state suit could proceed alone.

This Court's abstention order was prior to the state court's certification of the plaintiffs' class. However, as this Court noted, "[p]laintiffs, in both the state and federal proceedings, have filed motions to certify a class of commercial fishermen. Plaintiffs' counsel has conceded that certification of the requested state class would encompass the proposed federal class." *Id.* at 580. The state court appeared to recognize a class on May 22, 1996 in its written reasons for judgment. The state court applied its order to "the commercial fisherman [sic] who were either licensed or permitted to fish commercially when Act 1316 went into effect." The judgment of February 18, 1997 makes it definitive that a class action was in fact certified whereby the state court ordered that "the commercial fisherman who were either licensed or permitted to fish commercially when Act 1316 went into effect be certified as a class." Correspondingly, the federal plaintiffs prayed for class certification in the federal suit, requesting that they be allowed to sue "on behalf of all persons similarly engaged in commercial fishing in the Exclusive Economic Zone of the United States, adjacent to the State of Louisiana waters." *See* Doc. # 1. After having examined the parties and having considered the above-

mentioned concession by plaintiffs' counsel, the Court does believe that the federal plaintiffs were included in the class as it was defined in state court. The only questions that remain are whether the federal plaintiffs can be seen as having *de facto* opted out of the state suit and/or whether they are sufficiently related to the state plaintiffs so that they can be seen as having the necessary "identity of parties" for res judicata purposes.

Moreover, after this Court stayed the federal proceedings, the state court suit continued, at various stages (pursuant to numerous motions and appeals), until the Louisiana Supreme Court denied plaintiffs' final writ application on January 29, 1999. The named plaintiffs in the state court suit chose to fully and completely litigate all of their claims in the state court forum. Plaintiffs never purported to reserve any federal challenges to the Act for the federal court suit. The plaintiffs have succeeded on a few of their challenges to Act 1316; however, the Act for the most part remains intact. Besides their request to this Court for relief, the plaintiffs' only other available avenue is to seek review from the United States Supreme Court. The Court has no knowledge of whether or not this has been done.

While the named federal plaintiffs attempted to resume their suit in this Court several times during the pendency of the state court suit, this Court maintained its abstention stance in deference to the state court proceedings. In fact, on August 9, 1996, after the original state court judgment was handed down, this Court even dissolved the preliminary injunction it had issued six months earlier (in order to accommodate the state court ruling). *See* Doc. # 41. As this Court viewed the situation,

the interests of the commercial fisherman [sic] were being fully addressed at the state court level. There was no need for this Court to interfere. The state court dealt with the challenge to Act 1316 in the way that the plaintiffs presented it to them – as a challenge on behalf of all the aggrieved commercial fisherman [sic]. That class of people is the same class that the federal plaintiffs wish to represent (which earlier necessitated this Court's abstention order). The decision of the state court as to whether to uphold or strike down Act 1316 applied to all commercial fisherman [sic] (especially as evidence by the class certification), since the decision necessarily involves all commercial fisherman [sic] being treated exactly the same, whether they are party to a particular lawsuit or not.

The named federal plaintiffs assert that those of them not named in the state court suit should be allowed to have their day in federal court. They maintain that they should not be bound by an action that they *de facto* opted out of by filing their own federal suit. Those plaintiffs wish to present their arguments to this federal court and have it rule on Act 1316. They claim to have chosen this forum, not that of the state court.

However, the defendants claim that the federal suit is precluded by the *England* doctrine and the doctrine of "res judicata." They insist that these issues were fully and fairly litigated in state court (without any reservations), and the state court made a ruling. Defendants assert that the named federal plaintiffs fall within the class of people represented in the state court class action. They claim that any further adjudication of this federal action will merely involve relitigating issues already decided, with this Court hearing the same evidence, the same witnesses,

and the same attorneys as were employed in the state suit. In fact, defendants point to the fact that the federal plaintiffs have indicated a preference to submit the entire state record to this Court for it to make a decision, in lieu of new and/or additional evidence or testimony. Defendants assert that this Court is not a court of appeals for the state courts of Louisiana. Therefore, they claim that the decision of the state court should apply to all commercial fisherman [sic] (including the named federal plaintiffs), and res judicata should bar the federal suit.

II. LEGAL ANALYSIS

A. *The England Doctrine*

In *England*, the Supreme Court explicitly held that "if a party freely and without reservation submits his federal claims for decision by the state courts, litigates them there, and has them decided there, then – whether or not he seeks review of the state decision in the [U.S. Supreme Court] – he has elected to forgo his right to return to the [federal] District Court." *England*, 375 U.S. at 419, 84 S.Ct. 461. That case involved plaintiffs who sued first in a federal district court, but were then remitted by that court to a state court on abstention grounds for the purposes of resolving or clarifying an issue of state law. Although not applied to the plaintiffs in the *England* suit (based on principles of equity and reliance), the rule announced by the Supreme Court was that, in the future, when plaintiffs, subsequent to a final adjudication by the state court, request to have their federal claims relitigated in the federal district court, having already freely sought a "complete and final adjudication" of all their rights in

state court, the federal court should deny such a rehearing. *Id.*;[2] *see also Fuller Company v. Ramon I. Gil, Inc.*, 782 F.2d 306, 312 (1st Cir.1986) ("*England* does not afford a litigant two bites at the apple. Where . . . a litigant has raised its federal claim in a state court, it may not subsequently relitigate the same claim in a federal court without doing violence to well-settled principles of finality and repose.").

However, *England* does provide a way for a plaintiff to avoid having its federal claim determined by the state court in these instances. To evade the preclusive effects of the state court judgment, a plaintiff wishing to preserve his federal claims must: 1) "inform the state courts that he is exposing his federal claims there only for the purpose of complying with Windsor," *England*, 375 U.S. at 421, 84 S.Ct. 461 (citing *Government & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364, 77 S.Ct. 838, 1 L.Ed.2d 894 (1957) (holding that a party does not have to litigate his federal claims in state court when challenging the applicability of a state statute, but only that he must inform the state court what his federal claims are, so that

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[2] The Supreme Court in *England* stated further;

> [W]e [sic] no reason why a party, after unreservedly litigating his federal claims in the state courts although not required to do so, should be allowed to ignore the adverse state decision and start all over again in the District Court. Such a rule would not only countenance an unnecessary increase in the length and cost of the litigation; it would also be a potential source of friction between the state and federal judiciaries.

375 U.S. at 419, 84 S.Ct. 461.

the state statute may be construed "in light of" those claims); and, 2) desist from litigating his federal claims "freely and without reservation" in state court, *England*, 375 U.S. at 419, 84 S.Ct. 461. *See also United Parcel Service, Inc. v. California Public Utilities Comm.*, 77 F.3d 1178, 1183 (9th Cir.1996). As the Supreme Court in *England* states, "[t]here are fundamental objections to any conclusion that a litigant who has properly invoked the jurisdiction of a Federal District Court to consider federal constitutional claims can be compelled, without his consent and through no fault of his own, to accept instead a state court's determination of those claims." 375 U.S. at 415, 84 S.Ct. 461.[3] This Court notes that the abstention doctrine is not in conflict with the statement above, and does not imply a disregard for the primacy of the federal judiciary in deciding questions of federal law. *Id.* at 415-416, 84 S.Ct. 461.

In the "Gill-net" case before the Louisiana state court, the plaintiffs neither made the appropriate reservations nor refrained from "fully and completely" litigating all of their claims (including their federal claims). The plaintiffs before the Louisiana state court were not compelled to argue their entire case there, but they freely chose to do so. If the pure *England* question was the only issue faced by this Court, the plaintiffs' claims could be dismissed without necessitating much more discussion by this

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[3] The court in *England* concluded the following: "Thus in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination." 375 U.S. at 417, 84 S.Ct. 461 (footnote omitted).

Court. However, this Court must proceed because of this suit's more complex procedural and factual record (particularly because of the issue of identity between the state and federal court plaintiffs).

B. *Rankin and Pollard: Identifying the Plaintiffs*

(i.) Rankin

In *Rankin v. State of Florida,* 418 F.2d 482 (5th Cir.1969), the United States Court of Appeals for the Fifth Circuit reviewed a dismissal by the lower federal district court of a class action challenging the constitutionality of a Florida statute prohibiting political contributions by persons licensed by the state to sell alcoholic beverages. Pursuant to *England,* the Fifth Circuit upheld the dismissal by the district court on the grounds that the case had already been presented, litigated and decided in the Florida state courts.

On December 6, 1966, a class action on behalf of all persons licensed by the State of Florida to sell intoxicating beverages was brought in a Florida Circuit Court against the Attorney General and the Secretary of State of Florida to declare that this particular Florida statute was unconstitutional under Florida's state constitution and/or under the Fourteenth Amendment to the United States Constitution. *Id.* at 483. Subsequently, a declaratory judgment action was commenced in federal district court on December 30, 1966, seeking to have the Florida statute be declared violative of the Fourteenth Amendment of the U.S. Constitution. *Id.* at 483-484. The federal complaint was later amended into a class action on behalf of all

holders of licenses issued by the State of Florida permitting the sale of intoxicating beverages (both the state and federal suits proposed the same class of plaintiffs). *Id.* at 484. While the named plaintiffs in the two suits were different, they were both members of the same class and were represented by the same attorneys. *Id.* Under the facts of this case, the Fifth Circuit did not seem to believe that the federal plaintiff avoided the effects of the state court judgment by any *de facto* opting out of the state class action through the commencement of the federal suit.

The two suits at issue were brought almost simultaneously in both state and federal courts by different members of the same class. The federal district court and the Fifth Circuit both viewed these plaintiffs as acting in concert. The state action was litigated first and the plaintiff there argued both the state and federal constitutional issues without any reservation. The decision of the state trial court was favorable to the state court plaintiff, so the plaintiff in the federal action then moved to dismiss the federal action. However, that motion was withdrawn when it became apparent that the state decision was to be appealed (*i.e.*, the federal plaintiff was trying to preserve his second bite at the apple). When the state plaintiff lost in the Florida Supreme Court, the federal plaintiff attempted to seek a readjudication on the merits in federal district court. The Fifth Circuit recognized that at this point the situation became similar to abstention cases where the parties file in federal court and, when sent to state court, litigate the federal issues without reservation, and then seek to return to district court after the state

court disposes of all the issues presented.[4] Because of this recognition, the Fifth Circuit found that the *England* doctrine was properly applied to this situation.

Upholding the district court's well-placed reliance on *England*, the Fifth Circuit affirmed the following findings:

> (1) that the plaintiffs in the state and federal actions, being members of the same class and being represented by the same counsel, were identical; (2) that the federal constitutional issues were presented and argued without reservation before and decided by the Florida courts; and (3) that by pursuing their remedy unreservedly in state court, the plaintiffs elected to be bound by the state court on the federal constitutional issues, and that abstention by the federal courts is in order in such a case. . . .

Rankin, 418 F.2d at 484 (citing *England*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440; and, *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963)). Applying the doctrine of res judicata, which *England* "infused into the arena of abstention," the Fifth Circuit held that, "the plaintiff in the federal class is therefore barred from litigating further in federal court by the final determination of the state class action, since the parties and issues were identical in substance, if not form." *Rankin*, 418 F.2d at 485-486 (citing *Acree v. Air Line Pilots Ass'n*, 390 F.2d

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[4] The Fifth Circuit noted that, although the district court below invoked the abstention doctrine as the basis for dismissal, the situation presented in *Rankin* did not "fall neatly into the [a]bstention mold." 418 F.2d at 485. However, the Fifth Circuit held that these circumstances were sufficiently similar to those of the abstention cases to warrant the application of *England*. *Id.*

199 (5th Cir.1968) (noting that the "reality" or "substance" of the suits, not the form, should be controlling for res judicata purposes)).[5]

(ii.) Pollard

Furthermore, the Fifth Circuit later addressed a somewhat similar situation in *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir.1978). In *Pollard* the Fifth Circuit, ruling that res judicata should not have been applied under the facts of the case and the *England* doctrine, distinguished its holding in *Rankin* by noting that in *Pollard* "the state and federal cases were brought by different plaintiffs, none of whom sued in a representative capacity." 578 F.2d at 1008. The Fifth Circuit held that *Pollard* was not controlled by *Rankin*, but by *E.B. Elliott Adv. Co. v. Metropolitan Dade County*, 425 F.2d 1141 (5th Cir.1970). In *Elliott*, the court held that two named plaintiffs who were in no way involved in a previous state action challenging a local ordinance, "either as named parties or as members of a

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[5] The doctrine of res judicata and its application under Louisiana law to the "Gill-net" case is discussed *infra*, pp. 540-545. The Fifth Circuit in *Rankin* noted that under the doctrine of res judicata, a prior valid judgment operates as an absolute bar in another case on the same cause of action between the same parties and their privies. 418 F.2d at 486. Apparently, the Fifth Circuit believed that the parties in *Rankin* were privies to one another considering their aligned interests in having the statute declared unconstitutional, their common prayers for the certification of the exact same class, their mutual inclusion within the scope of the defined class, and their use of the same attorneys.

class being represented . . . are not bound by these previous adjudications." 425 F.2d at 1148.

Moreover, the Fifth Circuit in *Pollard* also addressed the defendants' argument that privity existed between the plaintiffs in both the state and federal suits through the doctrine of "virtual representation." The Fifth Circuit has recognized that " '[u]nder the federal law of res judicata, a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative.' " *Id.* at 1008 (quoting *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.1975)).[6] In holding that the

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[6] Because this Court is examining the preclusive effects of a Louisiana state court decision, this Court is bound to extend preclusive effect to the Louisiana state proceedings to the same extent that the state courts of Louisiana would do so. *See Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 84, 104 S.Ct. 892, 897, 79 L.Ed.2d 56 (1984); *Allen v. McCurry*, 449 U.S. 90, 99, 101 S.Ct. 411, 417, 66 L.Ed.2d 308 (1980). This means that this Court must apply the doctrine of res judicata as delineated by Louisiana law (discussed infra, pp. 540-545). The doctrine of "virtual representation" has been discussed by Louisiana state courts in the context of res judicata; however, most of the discussion is couched under the term "identity of parties" (which was a requirement under the old Louisiana res judicata statute that most probably survived the amendment – *see Duffy v. Si-Sifh*, 726 So.2d 438, 443 (La.App. 4 Cir.1999)) Both terms examine privity and the alignment of interests in determining whether res judicata can be applied to plaintiffs not formally named in the first suit. This Court believes that since the Louisiana res judicata statute (La. R. S.13:4231) has been amended recently to more closely resemble the federal res judicata doctrine, the doctrine of "virtual representation" would most probably be viewed as a suitable doctrine by the state courts of Louisiana. Nonetheless, this Court cannot

relationship between the state and federal plaintiffs in *Pollard* did not amount to the "close alignment of interests necessary under the virtual representation doctrine," the Fifth Circuit found as follows:

> the state court plaintiffs were in no sense legally accountable to the federal court plaintiffs; they shared only an abstract interest in enjoining enforcement of the ordinance. The [state court] plaintiffs sued in their individual capacities and not as representatives of a judicially certified class.

Id. at 1009. Moreover, the court held that representation by the same attorneys cannot furnish in itself the requisite alignment of interests because the substantial decision making authority with regards to the case lies with the client and not the lawyer. *Id.*

As the Court has stated above, the *England* inquiry is tied into the doctrine of res judicata. In order to dismiss a federal action on the basis of *England,* the court must determine that the doctrine of res judicata properly applies to the situation at hand. Therefore, this court must now examine Louisiana's law on res judicata. *See Migra,* 465 U.S. at 84, 104 S.Ct. 892; *Allen,* 449 U.S. at 99, 101 S.Ct. 411.[7]

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discern a great deal of difference between the "virtual representation" doctrine and the interpretation of the requirement of "identity of parties" by the Louisiana courts (especially considering the "strict construction" of the virtual representation doctrine employed by most jurisdictions).

[7] *See supra,* p. 540, footnote 6.

C. *Res Judicata*

Res judicata is an issue preclusion device found both in federal law and state law. According to LSA-R.S. 13:4231, a "valid and final judgment is conclusive between the same parties" if certain requirements are met. Louisiana's doctrine of res judicata bars relitigation of both claims and issues arising out of the same factual circumstances if there has been a valid final judgment. *See Duffy v. Si-Sifh Corp.*, 726 So.2d 438, 440 (La.App. 4 Cir.1999) (citing *Ansalve v. State Farm Mutual Automobile Insurance Co.*, 669 So.2d 1328, 1333 (La.App. 4 Cir.1996)). The res judicata statute, La. R.S. 13:4231, was amended effective January 1, 1991,[8] to provide as follows:

> Except as otherwise provided by law, a valid and final judgment is conclusive between the same parties, except on appeal or other direct review, to the following extent:
>
> (1) If the judgment is in favor of the plaintiff, all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and merged in the judgment;
>
> (2) If the judgment is in favor of the defendant, all causes of action existing at the time of the final judgment arising out of the transaction or occurrence that is the subject matter of the litigation are extinguished and the judgment

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[8] Act 521 of the 1990 regular session of the Louisiana Legislature revised Louisiana's laws pertaining to res judicata. *See Duffy*, 726 So.2d at 441.

> bars a subsequent action on those causes of action;
>
> (3) A judgment in favor of either the plaintiff or the defendant is conclusive, in any subsequent action between them, with respect to any issue actually litigated and determined if its determination was essential to that judgment.

The amended law (as opposed to the one in existence before 1991) will apply in the "Gill-net" case because the original state court suit was filed subsequent to the effective date of the act. The prior law concerning res judicata was substantially narrower than the prevailing federal law; actions were formerly barred if "the plaintiff sought the same relief based on the same cause or grounds." *Duffy*, 726 So.2d at 442 (citing *Morris v. Haas*, 659 So.2d 804, 810 (La.App. 5 Cir.1995)). The amendment constitutes a substantial change in the law. *Id.* According to the Official Comments to LSA-R.S. 13:4231, as well as the interpretation of the Louisiana Supreme Court, the new Louisiana law provides a broader application of res judicata, the purpose, now more aligned with that of federal law, being to foster judicial efficiency and to promote the final resolution of disputes by preventing needless litigation. *See Duffy*, 726 So.2d at 442 (citing *Terrebonne Fuel & Lube, Inc. v. Placid Refining Company*, 666 So.2d 624, 631 (La.1996)); *see also Fine v. Regional Transit Authority*, 676 So.2d 1134, 1136 (La.App. 4 Cir.1996).

The court in *Duffy* quoted an extensive passage from a 1996 Louisiana Supreme Court opinion, which delineated Louisiana's current stance on the doctrine of res judicata. This Court will also set forth that reasoning,

which starts by explaining the purposes behind the res judicata doctrine:

> As explained by former Chief Justice John A. Dixon, Jr.,
>
> > It is implicit in the concept of a judicial system that controversies be finally resolved so that parties may enjoy their rights and so that conflicting legal obligations may not be imposed on an individual; litigation must end at some point. Precluding relitigation prevents inefficient use of the courts' resources, reduces the possibility of harassment through vexatious suits, and helps maintain respect for the judicial proceeds [sic] by guarding against inconsistent decisions.
>
> Dixon, Booksh, Zimmering, Res Judicata in Louisiana since *Hope v. Madison*, 51 Tul.L.Rev. 611 (1977), footnotes in quotation omitted.

Under common law, the doctrine of res judicata focuses on "extinguishment" of the cause of action. A plaintiff's cause of action "merges" into a judgment for plaintiff, whereas a judgment for defendant "bars" relitigation of the cause of action, which is considered to be extinguished. "Since the cause of action is extinguished by the lawsuit, res judicata precludes litigation of not only that which was pleaded but also any issue which might have been pleaded with regard to that cause of action."

Arbour, The Louisiana Concept of Res Judicata, 34 La.L.Rev. 763, 764 (1974).

Conversely, the original Louisiana doctrine of res judicata was based on a presumption of

> correctness rather than an extinguishment of the cause of action. *Id.* A decided case precluded a second suit only if it involved the same parties, the same cause and the same object of demand as the prior suit. *Id.* However, under La.R.S. 13:4231, as amended in 1990 effective January 1, 1991,
>
> > a second action would be barred because it arises out of the occurrence which was the subject matter of the prior litigation. The central inquiry is not whether the second action is based on the same cause or cause of action (a concept which is difficult to define) but whether the second action asserts a cause of action which arises out of the transaction or occurrence which was the subject matter of the first action. This serves the purpose of judicial economy and fairness by requiring the plaintiff to seek all relief and to assert all rights which arise out of the same transaction or occurrence.
>
> *See* Comments – 1990, La.R.S. 13:4231, emphasis added.

Terrebonne Fuel & Lube, 666 So.2d at 631-632. It is apparent that Louisiana now follows the broader "transaction or occurrence" standard for res judicata, based on the idea of "extinguishment" of the cause of action. However, there is nothing in the amended law that suggests that "identity of parties" is no longer a requirement for a finding of res judicata. *See Morris*, 659 So.2d at 810; *see also Duffy*, 726 So.2d at 443.[9] Therefore, this Court must

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[9] While "identity of parties" still appears to be a requirement, it is probable that the element is gravitating

examine the structure of the commercial fisherman plaintiff class at the state court level and determine whether there is sufficient "identity of parties" so that res judicata may properly apply to the plaintiffs in the current federal suit.

D. *Identifying the Plaintiffs under Louisiana Law*

(i.) Duffy

In *Duffy*, the Louisiana Fourth Circuit Court of Appeals (hereinafter, "La. 4th Circuit") maintained an exception of res judicata in dismissing a class action. 726 So.2d 438. The *Duffy* case involved a class of plaintiffs who filed suit on behalf of themselves and those similarly situated, described as those known persons and entities who at that time resided in the United States of America and who purchased in the state of Louisiana funeral policies that were marketed and sold by Si-Sifh (defendant). *Id.* at 439. The class remaining for consideration as of the time this matter was decided in 1999 was defined as "a class of living heirs and/or beneficiaries of deceased insureds under burial insurance policies allegedly not honored by Si-Sifh, for which plaintiffs sought monetary relief." *Id.*

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toward the idea of "virtual representation" that exists in federal law. The Court notes that the Louisiana res judicata statute as amended is now more closely aligned with federal law. While virtual representation is not very different from "identity of parties," it may allow a little bit more latitude, particularly in exceptional circumstances such as *Duffy*.

The defendant (Si-Sifh) filed an exception of res judicata with the La. 4th Circuit, claiming that an identical class action suit previously filed in Jefferson Parish already had been dismissed by the Twenty-Fourth Judicial District Court (hereinafter, "24th JDC"). *Id.* at 440. The 24th JDC dismissed the case pursuant to a judgment maintaining a peremptory exception of no cause of action to the plaintiffs' use of the class action device. *Id.* That judgment of the 24th JDC had been affirmed by the Louisiana Fifth Circuit Court of Appeal. *Id.* In light of the procedural history of this suit, the La. 4th Circuit engaged in an extensive review of the applicable res judicata doctrine to see if the new case (the "second suit") was barred by the 24th JDC's decision in the first case.[10]

The court in *Duffy* noted that both the first suit and the second suit were brought against the same defendants and unquestionably arose out of the same transaction or occurrence. *Id.* at 442. Also, the court stated that except for the names of the proposed class representatives, and some minor amendments to the second petition, the petitions in the two cases were "virtually identical." *Id.* at 442-443. Furthermore, the court recognized specifically that the two petitions were filed by the same attorneys. *Id.* at 443. Pointing to these findings, the court concluded that there could be no real dispute that the second action "assert[ed] a cause of action which ar[ose] out of the transaction or occurrence which was the subject matter of the first action." *Id.* (quoting *Terrebonne Fuel & Lube*, 666 So.2d at 632).

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[10] The "res judicata" analysis of the court in *Duffy* was discussed *supra*, pp. 540-542.

The plaintiffs in *Duffy* claimed, as do the plaintiffs in the "Gill-net" case, that res judicata should not be applied because the named plaintiffs were not identically the same in both the first and second suits. *Id.* at 443. Holding that "identity of parties" remains a requirement for a finding of res judicata, the court in *Duffy* next addressed that particular issue, considering plaintiffs' argument that the first suit could not be considered to bar their actions in the second suit because none of the named plaintiffs in the second suit were named plaintiffs in the first. *Id.* (citing Morris, 659 So.2d at 810). Thus, the court went on to determine whether an identity of parties existed between the two cases.

The court found that "[i]dentity of parties does not mean the parties must be the same physical or material parties, but they must appear in the suit in the same quality or capacity." *Id.* (citing Morris, 659 So.2d at 810; *Lastie v. Warden*, 611 So.2d 721, 723 (La.App. 4 Cir.1992)). The only requirement is that the parties be the same "in the legal sense of the word." *Id.* The court in *Duffy* found that under that definition, an identity of parties existed between the two cases. *Id.* at 443. The named plaintiffs in each case were the proposed class representatives for the exact same class of people, since the definitions of the class as alleged were identical in the two cases. *Id.* Thus, the court in *Duffy* held that the parties were the same in the legal sense of the word. *Id.*

The plaintiffs in *Duffy* concentrated on the fact that the named plaintiffs in the two suits were different, coupled with the fact that the class was never certified in the first suit. *Id.* Because the class had never been certified, plaintiffs argued, the named plaintiffs in the first suit

could not be regarded as having represented the named plaintiffs in the second suit. *Id.* However, the court in *Duffy* reasoned that the plaintiffs failed to acknowledge the "reality" of the facts of the case. *Id.* The "party plaintiffs" in the first case were all the members of the defined class; the "party plaintiffs" in the second suit were the very same people. *Id.* The court found that the fact that different proposed representatives filed suit in the second case should not affect its analysis. *Id.* Thus, the court held that the "identity of parties" requirement for a class action was present.[11]

Importantly, the court in *Duffy* reasoned that "allowing the plaintiffs to relitigate the class action question in the instant case would encourage forum shopping, allowing the plaintiffs numerous 'bites' at the class action 'apple,' and frustrate the purposes of the res judicata doctrine." *Id.* (footnote omitted). The court feared that a contrary ruling would allow for the possibility that different "named plaintiffs" could file suit in different forums throughout the state of Louisiana until the plaintiffs finally found a forum which would certify its class action. *Id.* at 443, n. 2. Allowing for such a sequence of events, the court concluded, would not serve the purposes of

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[11] However, the court in *Duffy* noted that nothing in the decision in the first suit or in the decision of that court itself affected the rights of the individual plaintiffs who filed the second suit. *Id.* The court stated that those individual plaintiffs still had a right to assert a cause of action for their losses. *Id.* This was because the only issue substantially reached in those decisions was a finding of no cause of action to the plaintiffs' (those in both suits, who were found to be the very same people) use of the class action device. *See Id.* at 440.

judicial economy, fairness and protection of the defendants from multiple lawsuits. *Id.*

(ii.) Cauefield

Another opinion which has some bearing on the "Gill-net" case is *Cauefield v. Fidelity Casualty Company of New York*, 378 F.2d 876 (5th Cir.1967). In *Cauefield* the Fifth Circuit, applying Louisiana law, held that under the doctrine of judicial estoppel, federal plaintiffs in a second suit were precluded from maintaining their cause of action because the same matter had already been litigated and decided in the state courts of Louisiana. The Fifth Circuit applied judicial estoppel instead of res judicata because the demand (statutorily required at that time) for "identity of parties" was seen as stricter for res judicata than it was for judicial estoppel. *Id.* at 878. This Court believes that in light of the recent amendment to the Louisianan [sic] res judicata statute (effective as of January 1, 1991, becoming much more similar to the broader federal res judicata law (applied by most jurisdictions)) and such expansive state court decisions as *Duffy*, the "identity of parties" element is now more in line with the doctrine of "virtual representation." At the very least, "identity of parties" has been expanded to include situations beyond the stricter traditional relationships which were seen as satisfying that element in the past. Nonetheless, whether this Court applies res judicata (as in *Duffy*) or judicial estoppel (as in *Cauefield*), the outcome would be the same.

The unusual procedural posture and factual background of *Cauefield* merits close inspection. A total of forty-one relatives of persons buried in a cemetery

brought numerous actions in Louisiana state courts for desecration as a result of cleaning operations in the cemetery. *Id.* at 877. One of those suits, filed by an individual plaintiff (Sid Thomas), was commenced and tried before a jury (hereinafter, the "Thomas case"). *Id.* In a trial lasting nine days, all interested relatives testified, and the two federal plaintiffs in *Cauefield* were active participating witnesses. *Id.* The jury found that there had been no desecration. *Id.* The burden of proof here was significant in that the plaintiff in the Thomas case needed to show only that any part of the cemetery had been desecrated. *Id.* at 878. Therefore, it would have been sufficient for the jury to have accepted the testimony of any witness indicating that any grave in the cemetery had been desecrated. *Id.* The federal *Cauefield* matter had even been continued indefinitely until after the completion of the state court's Thomas case. *Id.* at 877. The Fifth Circuit stated that "[i]t thus appears that the Thomas case tacitly was intended to resolve all the numerous identical claims that the cemetery had been desecrated." *Id.*

Moreover, the federal plaintiffs conceded that the issues previously determined by the state court would be the same issues they would be litigating in the federal court. *Id.* at 878. The plaintiffs admitted as well that the "evidence and testimony they would be able to produce would not differ in the least from that which they themselves and the other relatives presented and which was passed on in the Thomas case." *Id.* Therefore, the federal plaintiffs would be merely relitigating a case that had already been tried and rejected by a Louisiana state court. Also, the Fifth Circuit noted as significant that all the

state court plaintiffs, as well as the federal plaintiffs, were represented by the same attorneys. *Id.* at 877.

The situation presented in *Cauefield* is very similar to our state court class action situation. In *Cauefield*, there was a group of individuals with identical interests who acted in concert to fight a particular perceived injury. The battle commenced in state court, with one plaintiff leading a coordinated effort against the defendants. Everything was brought to the state court battle – nothing was saved for a later time. Another fight (*i.e.*, the federal one) was put on hold while the group focused on the state court battle. Once the battle was lost, the federal representatives attempted to lead the group on another campaign. However, the Fifth Circuit in *Cauefield* held that the state court battle was the war, and the war was lost. This group could fight no more. The court in *Cauefield* punctuated that position by stating, "absolutely nothing would be gained were [the federal plaintiffs] permitted to pursue their action in the federal court." *Id.* at 879.[12]

This court believes that the "Gill-net" matter presents sufficiently analogous circumstances to the cases analyzed above. The battle against Act 1316 should not be fought twice by our group sharing "identity of parties." Furthermore, there is another doctrine which suggests that this federal Court should refrain from rehearing the "Gill-net" case. This doctrine is discussed below.

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[12] This Court reiterates that the group (those from both the state and federal suits) must be in privity with one another – there must be an "identity of parties."

E. *Rooker-Feldman and Full Faith and Credit*

The *Rooker-Feldman* doctrine holds that federal district courts lack jurisdiction to entertain collateral attacks on state court judgments. *See Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 44 S.Ct. 149, 150, 68 L.Ed. 362 (1923) (the jurisdiction of the federal district court "is strictly original"); *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 & 482, 103 S.Ct. 1303, 1311 & 1315, 75 L.Ed.2d 206 (1983) ("a United States District Court has no authority to review final judgments of a state court in judicial proceedings"); *see also, e.g. Davis v. Bayless*, 70 F.3d 367, 375-376 (5th Cir.1995) ("When issues raised in a federal court are 'inextricably intertwined' with a state judgment and the court is 'in essence being called upon to review the state-court decision,' the court lacks subject matter jurisdiction to conduct such a review.") As the Fifth Circuit states in *Liedtke v. State Bar of Texas*,

> Constitutional questions arising in state proceedings are to be resolved by the state courts. If a state trial court errs the judgment is not void, it is to be reviewed and corrected by the appropriate state appellate court. Thereafter, recourse at the federal level is limited solely to an application for a writ of certiorari to the United States Supreme Court.

18 F.3d 315, 317 (5th Cir.1994) (footnotes omitted) (citing *Rooker* and *Feldman*). Furthermore, the court in *Liedtke* explained that "absent a specific delegation 'federal district court[s], as court[s] of original jurisdiction, lack[ ] appellate jurisdiction to review, modify, or nullify final order[s] of state court[s].' " *Id.* (quoting *Kimball v. Florida Bar*, 632 F.2d 1283, 1284 (5th Cir.1980) (footnote omitted)).

The *Rooker-Feldman* doctrine is yet another principal mitigating in favor of dismissal of the federal "Gill-net" suit. The plaintiffs have stated that they would be willing to submit the entire state record to this Court in lieu new and/or additional evidence or testimony. Viewed in light of the legal analysis the Court has gone through so far, it seems to this Court that it would be violative of the principles behind the *Rooker-Feldman* doctrine if the Court did not dismiss the federal "Gill-net" suit under the doctrine of res judicata. The plaintiffs should have, and did, appeal the lower state court rulings through the appropriate channels. Since the Louisiana Supreme Court has already given its final word, the only possibility remaining now for relief exists with the United States Supreme Court.

To support further this Court's application of the Louisiana res judicata doctrine to the "Gill-net" case, the Court cites to *Gauthier v. Continental Diving Services, Inc.*, 831 F.2d 559, 561 (5th Cir.1987), which held as follows:

> *Rooker-Feldman* casts in jurisdictional terms a rule that is very close if not identical to the more familiar principle that a federal court must give full faith and credit to a state court judgment. *See* 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4469 at 664-68 (1981). To satisfy the full faith and credit requirement, a federal court must give the same deference to a state court judgment that a court of the rendering state would give it. 28 U.S.C. § 1738 (1986); *see also A.L.T. Corp. v. Small Business Admin.*, 801 F.2d 1451, 1456 (5th Cir.1986).

However, a federal could [sic] should not give greater deference to a state court judgment than a court of that state would give. *Id.* Therefore, *Gauthier*, when read in conjunction with *Migra* and *Allen* (*see* p. 540, footnote 6), validates the Court's earlier employment of the Louisiana res judicata doctrine. This Court does not believe that a Louisiana state court would permit this group of named federal plaintiffs to proceed in state court with an identical suit. Therefore, this Court should not allow it.

F. *Conclusion*

Since all remedies within the Louisiana state court system have been exhausted, the Court believes that it is appropriate to lift the stay previous [sic] placed on this matter pursuant to the Pullman abstention doctrine. However, the Court finds that the final decision of the Louisiana state court precludes the federal action from proceeding under the doctrine of res judicata. The named federal plaintiffs were included as members in the certified class in state court and the proposed federal class was encompassed by the state class. The named federal plaintiffs, through their counsel (who were also counsel in the state court suit), have even suggested that this Court simply review the state court record when it is time to reach a decision. There is no substantially new or different evidence sought to be introduced in the federal trial. This Court holds that the commercial fisherman have already challenged Act 1316 in state court. The interests of all commercial fisherman [sic] were aligned in that suit (the fate of all the commercial fisherman [sic] was [sic] on the line). The situation presented involves a sufficient "identity of parties." Moreover, there was no

reservation of the federal claims made in the state court suit. The plaintiffs there "fully and completely" litigated their claims in state court, pursuant to their free will. The reality of the "Gill-net" suit is that the commercial fisherman [sic] wanted to challenge Act 1316 – that challenge was heard and decided. This Court is prohibited from acting as an appellate court for Louisiana state court suits. Under *England, Rankin, Duffy,* and *Cauefield* (among others), the federal action should be, and is, dismissed.

Accordingly,

IT IS ORDERED that the plaintiffs' motion to lift the stay is **GRANTED.**

IT IS FURTHER ORDERED that the defendants' motion to dismiss is **GRANTED, DISMISSING** the claims of the plaintiffs **WITH PREJUDICE.**

LOUISIANA SEAFOOD MANAGEMENT, et al.

v.

FOSTER, et al.

No. Civ.A. 96-106,

United States District Court,
E.D. Louisiana.

June 24, 1999.

Paul R. Baier, Baton Rouge, LA, Robert A. Barnett, Guste, Barnett & Shushan, LLP, New Orleans, LA, for John E. Thompson, Eddie LeJuine, Matthew Reagan, Clara Gerica, Todd Stipelcovich, Barry Schaferkotter, David A. Mills, Christon Cheramie, Peter Steven Hotoph, Eugene Hickman, Chad Lay, Lindberg Santini, Ned F. Malley, Jr., Barisich Inc.

Judith Ruth Atkinson, Thomas E. Balhoff, Roedel, Parsons, Koch, Frost, Balhoff & McCollister, Baton Rouge, LA, for Coastal Conservation.

Edmond W. Shows, Shows, Cohn & Cali, Baton Rouge, LA, Frederick Coller Whitrock, Louisiana Dept. of Justice, Public Protection Div., Baton Rouge, LA, Thomas Michael Landrum, Donald E. Puckett, Laura Heap, Louisiana Dept. of Wildlife and Fisheries, Baton Rouge, LA, Ronnie J. Berthelot, Shows, Cali & Burns, Baton Rouge, LA, for Murphy J. Foster, Jr., Richard P. Ieyoub, Joe L. Herring, Peter Vujnovich, John F. Schneider, Perry Gisclair, Daniel Babin, Joseph P. Cormier, Glynn Carver, Wynton Vidrine, Louisiana Wildlife and Fisheries Commission, Louisiana Dept. of Wildlife and Fisheries.

Edmond W. Shows, Shows, Cohn & Cali, Baton Rouge, LA, Frederick Coller Whitrock, Louisiana Dept. of Justice, Public Protection Div., Baton Rouge, LA, Thomas

Michael Landrum, Donald E. Puckett, Laura Heap, Louisiana Dept. of Wildlife and Fisheries, Baton Rouge, LA, Ronnie J. Berthelot, Shows, Cali & Burns, Baton Rouge, LA, for Charles Clark.

PORTEOUS, District Judge.

This matter came for hearing upon the plaintiffs' motion for a new trial, seeking this Court to reexamine its previous dismissal of the plaintiffs' federal suit. Oral arguments were waived and this matter was taken under submission on the briefs only. The Court, having reviewed the record, the applicable law, and the memoranda of the parties, is fully advised in the premises and ready to rule.

ORDER AND REASONS

I. FACTUAL BACKGROUND

The facts of this case have been discussed previously at length. The Court hereby adopts the facts as set forth previously, and refers the parties to the voluminous record of this case for any required recitation of the facts. Briefly, the plaintiffs now come before the Court seeking a new trial on the grounds of legal error. The plaintiffs contend that concerns over due process, the absence of privity between the state and federal plaintiffs challenging the "Gill-net" law, and the alleged failure of the Louisiana state court in complying with the requirements of Louisiana class action law prohibit this Court from barring this suit through the doctrine of res judicata. The defendants submit that this Court was correct in barring this suit in its earlier Order and Reasons. *See Doc. # 71 – Louisiana Seafood Management Council, Inc. v. Foster*, 46 F.Supp.2d 533 (E.D.La.1999) (hereinafter, "Initial Dismissal").

II. LEGAL ANALYSIS

A. Motion for a New Trial

Federal Rule of Civil Procedure ("FRCP") 59(a) states that a district court may grant a new trial "on all or part of the issues . . . for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States." The decision to grant or deny a motion for a new trial is within the sound discretion of the trial court. *Pryor v. Trane Company*, 138 F.3d 1024, 1026 (5th Cir.1998). Although FRCP 59(a) does not enumerate grounds for a new trial, a district court may grant a new trial if it committed prejudicial error or if the verdict is against the great weight of the evidence. *Smith v. Transworld Drilling Co.*, 773 F.2d 610, 613 (5th Cir.1985).

B. *Richards v. Jefferson County, Alabama*

The plaintiffs in the "Gill-net" matter contend that the application of the doctrine of res judicata in this case is violative of due process requirements as delineated in *Richards v. Jefferson County, Alabama*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996) (hereinafter, "*Richards*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76"). This Court will first analyze *Richards*, then examine its progeny and the manner in which those cases viewed "virtual representation" as a category for finding privity between different sets of plaintiffs for the purposes of res judicata.

In an earlier action, the acting director of finance for the city of Birmingham and the city itself brought suit challenging the validity of the county's occupational tax on state constitutional grounds. This prior action had

been consolidated for trial with a separate suit brought by three county taxpayers. *See Bedingfield v. Jefferson County*, 527 So.2d 1270 (hereinafter, "the *Bedingfield* suit"). The end result was an upholding of the tax by the Supreme Court of Alabama. *Id.* The petitioners in the subsequent *Richards* suit were two individuals privately employed by the county. 517 U.S. at 794, 116 S.Ct. 1761. These individuals represented a class of all nonfederal employees subject to the county's tax. *Id.* at 795, 116 S.Ct. 1761. The petitioners in *Richards* challenged the county's tax on both federal and state constitutional grounds. *Id.*

The state trial court in the *Richards* suit determined that the state constitutional claims were barred by the results of the prior litigation, but concluded that the federal claims were not barred because they had not been decided by either the *Bedingfield* trial court or the Alabama Supreme Court. *Id.* However, on appeal the Alabama Supreme Court, recognizing that a prior judgment is generally " 'res judicata not only as to all matters litigated and decided by it, but as to all relevant issues which could have been but were not raised and litigated in the suit,' " ordered that the federal claims were barred as well as the state claims as a result of the adjudication in the *Bedingfield* suit. *Id.* at 795-796, 116 S.Ct. 1761. Among other reasons, the Alabama Supreme Court felt that res judicata was properly applied to both the federal and state claims here because the *Richards* petitioners were adequately represented by the petitioners in the *Bedingfield* suit. *Id.* at 796, 116 S.Ct. 1761.

The United States Supreme Court granted certiorari in *Richards* and determined that the decision of the Alabama Supreme Court deprived the petitioners of the due

process of the law guaranteed by the Fourteenth Amendment. *Id.* at 797, 116 S.Ct. 1761. After setting forth the general rules for the application of the doctrine of res judicata, the United States Supreme Court stated as follows:

> The limits on a state court's power to develop estoppel rules reflect the general consensus " 'in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.' *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115[117], 85 L.Ed. 22 (1940). . . . This rule is part of our 'deep-rooted historic tradition that everyone should have his own day in court.' 18 C[harles]. [A.] Wright, A[rthur]. [R.] Miller, & E [dward]. [H.] Cooper, Federal Practice and Procedure § 4449, p. 417 (1981)." *Martin v. Wilks*, 490 U.S. 755, 761-762, 109 S.Ct. 2180, 2184, 104 L.Ed.2d 835 (1989). As a consequence, "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.*, at 762, 109 S.Ct., at 2184; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329, 91 S.Ct. 1434, 1443, 28 L.Ed.2d 788 (1971).

Id. at 797-798, 116 S.Ct. 1761. Despite these general requirements, the United States Supreme Court pointed out that "these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party bound by an earlier judgment." *Id.* at 798, 116

S.Ct. 1761. Moreover, the Supreme Court explained, "although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. *See generally* Restatement (Second) of Judgments, ch. 4 (1980) (Parties and Other Persons Affected by Judgments)."[1] *Id.*

Furthermore, noting that the parties to the *Bedingfield* suit failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights, the Supreme Court reviewed its decision in *Hansberry v. Lee*, 311 U.S., at 40-41, 61 S.Ct., at 117-118, for guidance on the interplay of due process and the doctrine of res judicata. *Id.* at 800-801, 116 S.Ct. 1761. In *Hansberry*, the Supreme Court "recognized the 'familiar doctrine . . . that members of a class not present as parties to the litigation may be bound by the judgment where they

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[1] In addition, the Supreme Court quoted its opinion in *Martin v. Wilks*, 490 U.S., at 762, n. 2, 109 S.Ct., at 2184, n. 2, wherein the Court maintained as follows:

> We have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party. *See Hansberry v. Lee*, 311 U.S. 32, 41-42, 61 S.Ct. 115, 117-118, 85 L.Ed. 22 (1940) ('class' or 'representative' suits); Fed. Rule Civ. Proc. 23 (same); *Montana v. United States*, 440 U.S. 147, 154-155, 99 S.Ct. 970, 974, 59 L.Ed.2d 210 (1979) (control of litigation on behalf of one of the parties in the litigation).

Richards, 517 U.S. at 798-799, 116 S.Ct. 1761.

are in fact adequately represented by parties who are present, or . . . the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter.' *Hansberry*, 311 U.S., at 42-43, 61 S.Ct., at 118-119." *Richards*, 517 U.S. at 800-801, 116 S.Ct. 1761. However, the doctrine of representation of absent parties in a class suit could not be applied to the petitioners in *Hansberry* (the second action) because of the particular facts of that case. *Id.* This conclusion resulted from the *interests* of the class members who had been a party to the prior litigation being *in conflict* with the absent members who were the defendants in the subsequent action. *Id.* at 801, 116 S.Ct. 1761.

Moreover, the Supreme Court reasoned that "[e]ven assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice,"[2] *Hansberry* could not be read to permit the application of res judicata in the *Richards* suit. *Id.* at 801, 116 S.Ct. 1761. The Supreme Court explained that in order for a prior proceeding to have a binding effect on absent parties, the prior proceeding "would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.' [*Hansberry*,] 311 U.S., at 43, 61 S.Ct., at

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[2] *But cf., Id.*, at 40, 61 S.Ct., at 117; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 2152, 40 L.Ed.2d 732 (1974); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S., at 319, 70 S.Ct., at 659-660.

119; *cf. Phillips Petroleum Co. v. Shutts*, 472 U.S., at 811-812, 105 S.Ct., at 2974." *Id.* Finding that the *Bedingfield* suit did not conform to the above-stated description, the Supreme Court denied any preclusive application of the *Bedingfield* suit to *Richards*. *Id.* The Supreme Court emphasized that the doctrine of adequate representation could not be applied here because of the following reasons: (1) "the three county taxpayers who were parties in *Bedingfield* did not sue on behalf of a class;" (2) "their pleadings did not purport to assert any claim against or on behalf of any nonparties;" and, "the judgment they received did not purport to bind any county taxpayers who were non-parties." *Id.*[3] Therefore, since the Supreme Court concluded that the petitioners in *Bedingfield* and *Richards* were "best described as mere 'strangers' to one another," due process prevented the *Richards* petitioners from being bound by the *Bedingfield* judgment.[4] *Id.* at 802, 116 S.Ct. 1761.

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[3] *See also South Central Bell Telephone Company v. Alabama*, ___ U.S. ___, ___, 119 S.Ct. 1180, 1185, 143 L.Ed.2d 258 (1999) (where the Supreme Court reaffirmed *Richards* by stating that because of factors similar to those present in *Richards*, adequate representation could not exist between two sets of petitioners that were mere "strangers" to one another).

[4] This Court notes in the following passage that the Supreme Court distinguished the doctrines of "res judicata" and "stare decisis" when responding to the assumption that the *Bedingfield* action conclusively established the constitutionality of the occupation tax:

> Of course, we are aware that governmental and private entities have substantial interests in the prompt and determinative resolution of challenges to important legislation. . . . [However, a] state court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to

C. *Richards' Progeny*

Several cases have cited to *Richards* for support when dealing with preclusion through privity; however, there are three main Circuit Court of Appeals decisions which this Court believes most thoroughly address the issue of "virtual representation." *See Tice v. American Airlines*, 162 F.3d 966 (7th Cir.1998); *Bittinger v. Tecumseh Products Company*, 123 F.3d 877 (6th Cir.1997); and, *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir.1996). After reviewing these cases, this Court believes that an initial examination of *Tyus* is most helpful.

(i) *Tyus v. Schoemehl*

This suit was the second one filed challenging the validity of the new St. Louis aldermanic boundaries. *Tyus*, 93 F.3d at 450. The petitioners in both suits challenged the boundaries pursuant to the Voting Rights Act and the federal constitution. *Id.* at 450-452. Petitioners were in essence claiming that the new boundaries impermissibly diluted the voting strength of African-Americans in this area by fragmenting black voters. *Id.*

Among the named plaintiffs in the first suit ("the Alderman-AAVR suit") were five African-American St.

> bind a litigant to a prior judgment to which he was not a party. That general rule clearly applies when a taxpayer seeks a hearing to prevent the State from subjecting him to a levy in violation of the Federal Constitution.

Richards, 517 U.S. at 804-805, 116 S.Ct. 1761.

Louis alderman and the African American Voting Rights Legal Defense Fund ("AAVR"). *Id.* at 451. The defendants in the first suit (hereinafter, collectively referred to as "the City") filed a motion for summary judgment. *Id.* After having a dispute over trial strategy with their original counsel, the Alderman plaintiffs filed a motion to voluntarily withdraw from the suit and have their claims dismissed without prejudice. *Id.* However, before the motion to withdraw was disposed of by the court, the Alderman plaintiffs (through their new attorney) attempted to file a late opposition to the City's motion for summary judgment. This motion for leave to file late was denied. *Id.*

While the City's motion for summary judgment was pending, but before any ruling on the Alderman plaintiffs' motion to withdraw, the Alderman plaintiffs filed a second lawsuit (hereinafter, "the Miller suit") against the City raising the same claims that were raised in the Alderman-AAVR suit. *Id.* Both suits were filed in federal district court. In the new suit the Alderman plaintiffs were joined by three additional individual plaintiffs. *Id.* at 452. At this time, the same counsel represented the petitioners in each suit. *Id.*

Eventually, the court in the first suit (*i.e.*, the Alderman-AAVR suit) granted the City's motion for summary judgment and denied as moot the Alderman plaintiffs' motion to withdraw. *Id.* After these rulings by the court, the plaintiffs in the first suit filed a FRCP 59(e) motion to alter or amend the court's previous orders. *Id.* The motion was denied. *Id.* Furthermore, the Miller suit had been stayed pending the resolution of the FRCP 59(e) motion. *Id.* After that motion was denied, the plaintiffs in the

Miller suit moved to amend their complaint, dropping the Alderman plaintiffs from the suit, and adding two new plaintiffs. *Id.* However, the court in the Miller suit granted the City's motion for summary judgment on claim preclusion grounds,[5] then denied as moot the motions to amend the complaint and to add new plaintiffs. *Id.* The court held that the Alderman plaintiffs were clearly barred by the Alderman-AAVR suit from relitigating their claims in the Miller suit. *Id.* Regarding the three new individual plaintiffs in the Miller suit, the court held that although they were not parties to the first suit, they were "nevertheless in privity with the plaintiffs in the Alderman-AAVR suit under a theory of 'virtual representation.' " *Id.* The court viewed the three new plaintiffs as having been adequately represented by the plaintiffs in the first suit. *Id.*

The Eighth Circuit Court of Appeals reviewed the decision of the district court solely as to whether the Miller plaintiffs were in privity with the Alderman plaintiffs, so that the Miller plaintiffs should be bound by the result in the Alderman-AAVR suit. *Id.* at 453. The Eight [sic] Circuit began by noting that "[p]reclusion is rooted in concerns of judicial economy" and in the protection of defendants from " 'the expense and vexation attending multiple lawsuits.' " *Id.* (citations omitted). Furthermore, the court set forth the general concerns over due process when dealing with preclusion as follows:

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[5] The Eight [sic] Circuit Court of Appeals affirmed the district court's summary judgment based upon issue preclusion instead of claim preclusion. *Id.* at 453, n. 5, 6.

> [D]ue process concerns are present when the party sought to be precluded was not an actual party in the first lawsuit. Because preclusion based on privity is an exception to the "deep-rooted historic tradition that everyone should have his own day in court," *Richards v. Jefferson County, Ala.*, 517 U.S. 793, 798, 116 S.Ct. 1761, 1766, 135 L.Ed.2d 76 (1996) (citation omitted), courts must ensure that the relationship between the party to the original suit and the party sought to be precluded in the later suit is sufficiently close to justify preclusion. Thus, "the due process clauses prevent preclusion when the relationship between the party and nonparty becomes too attenuated." *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F.2d 84, 95 (5th Cir.), cert. denied, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977).

Id. at 454. Furthermore, citing a Fifth Circuit case (*Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir.)), the court in *Tyus* went on to consider the "adequate representation" or "virtual representation" category of nonparties in privity with plaintiffs in a prior action,[6] and whether or not, based upon the facts of this case, due process was satisfied when the district court precluded the three new plaintiffs from maintaining the Miller suit. *Id.*

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[6] The Eighth Circuit here views "adequate representation" or "virtual representation" as synonymous with one another. Furthermore, the court recognizes these terms as merely a category for finding privity between nonparties and parties to the prior action. *Id.* at 454. We distinguish this view from the one taken by *Bittinger v. Tecumseh Products Company*, 123 F.3d 877, which views "virtual representation" as separate and distinct from "privity."

Moreover, while the principle of "virtual representation" is generally accepted, the court in *Tyus* noted that courts are divided on how to implement it. *Id.* at 454. Distinguishing between the wide and limited uses of the "virtual representation" doctrine, the court adopted the wide use, which involves a fact-intensive inquiry into "whether there exists a substantial relationship between the party and nonparty, such that the party adequately represented the interests of the nonparty." *Id.* at 454-455. Furthermore, the court stated,

> Because of the fact-intensive nature of these inquiries, there is no clear test that can be employed to determine if virtual representation is appropriate. It is evident, however, that because virtual representation rests on the notion that it is fair to deprive a nonparty of his day in court, "virtual representation has a pronounced equitable dimension." *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir.1994). A nonparty will be barred from bringing his claim only when "the balance of the relevant equities tips in favor of preclusion." *Id.*

Id. at 554. Noting the due process concerns of courts applying the more limited use of "virtual representation," the court in *Tyus* cited to *Richards*, and pointed out the "privity" exception that this Court has explained above. *Id.* at 455. The *Tyus* court reasoned that virtual representation falls squarely within *Richards'* "privity" exception. *Id.* In order to determine when there is a special relationship between the parties, so that they are no longer "mere strangers," the court examined several guiding principles

for determining when the "virtual representation" doctrine, which the court viewed as based upon the alignment of interests between the parties, appropriately bars relitigation of the nonparty's claims. *Id.* at 455-456. These principles are as follows:

> First, identity of interests between the two parties is necessary, though not alone sufficient. *See Mann v. City of Albany, Ga.*, 883 F.2d 999, 1003 (11th Cir.1989). Other factors to be considered "include a close relationship between the prior and present parties; participation in the prior litigation; apparent acquiescence; and whether the present party deliberately maneuvered to avoid the effects of the first action." *Petit v. City of Chicago*, 766 F.Supp. 607, 612 (N.D.Ill.1991) (citing 18 [Charles A.] Wright, [Arthur R.] Miller & [Edward H.] Cooper, Federal Practice & Procedure: Jurisdiction § 4457).
>
> Another factor to consider is adequacy of representation, *Gonzalez*, 27 F.3d at 762, which is best viewed in terms of incentive to litigate. [footnote omitted]. That is, one party "adequately represents" the interests of another when the interests of the two parties are very closely aligned and the first party had a strong incentive to protect the interests of the second party.
>
> Finally, the nature of the issue raised – whether a public law issue or private law issue – is important. Although virtual representation may be used in the private law context, its use is particularly appropriate for public law issues.

Id.

In the Eighth Circuits's application of the facts of its case to the guiding principles listed above, some basic findings were made. First, the court found that the claims of each set of petitioners were virtually identical; and, furthermore, there was even an overlap in plaintiffs between the two suits. *Id.* at 457. Secondly, the court was swayed in its finding of privity because the same counsel was utilized in both suits. *Id.* Moreover, the court identified a special alignment of interests in that most of the plaintiffs were aldermen and all the plaintiffs shared the same concern – the dilution of the African-American vote in St. Louis. *Id.*

Particularly, however, the court stressed two specific elements, the presence of which caused the court great concern about allowing the suit to go forward. These two elements were (1) the public law nature of the issue raised,[7] and (2) the tactical maneuvering that was so obviously taking place. *Id.* at 456-457. When viewed together these elements display how plaintiffs who are likewise affected by a piece of legislation can combine their efforts in order to "allow various members of a coordinated group to bring separate lawsuits in the hope

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[7] This Court notes that the "Gill-net" ban law is a piece of state legislation that has an affect upon the private rights of the commercial fisherman to pursue their trade. This Court is not suggesting that the "Gill-net" ban law has merely an indirect impact upon the general public, such as the general dilution of African-American voting power. However, this Court is suggesting that the "Gill-net" ban law was created by a public body to apply across the board to individuals who wish to use gill nets to catch certain species of fish.

that one member [or group of members] would eventually be successful, benefiting the entire group. This entails a significant cost to the judicial system and 'discourage[s] the principles and policies the doctrine of res judicata was designed to promote.' " *Id.* at 457. Allowing a coordinated group to continually raise public law issues already decided would risk allowing the litigation to "assume immortality." *Id.* at 456-457. In the context of a public law issue, if the plaintiffs in the first suit win, then everyone in the group benefits. *Id.* However, in the absence of "virtual representation" or preclusion through privity, plaintiffs in the group who tactically maneuvered away from the binding effects of the first suit, would nonetheless benefit from the first suit if it succeeds, but would not be penalized if the first suit fails.[8] *Id.* Such a situation would encourage "fence-sitting," thereby discouraging the principles behind the doctrine of res judicata. *Id.*

Based upon the court's findings that the guiding principles set forth above weighed heavily in favor of finding preclusion through privity, the claims of the Miller petitioners were adjudged to be barred by the doctrine

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[8] Also, this Court fails to see how, in our "Gill-net" case, the state court plaintiffs, who have already had their claims adjudicated, would not benefit from an advantageous ruling in this federal court. The "Gill-net" ban must necessarily apply to all the commercial fisherman [sic]. This Court is not suggesting that the "Gill-net" ban has been declared constitutional for all time, but only that petitioners in the federal suit who are in privity with the petitioners in the state court suit should be precluded from maintaining this cause of action under the doctrine of res judicata.

of res judicata. This Court believes it would be helpful to review the concurring opinion in *Tyus* as well, in order to help distinguish the facts of the "Gill-net" case from such cases as *Tice v. American Airlines*, 162 F.3d 966, and *Bittinger v. Tecumseh Products Company*, 123 F.3d 877. Judge Henley concurred in the *Tyus* decision, expressing his agreement with the outcome of the majority along with his concerns over some of the language of the opinion. *Id.* at 458-459. Judge Henley specifically referred to the language of *Richards* regarding "notice" and the insurance that the prior proceeding involved "the full and fair consideration of the common issue." *Id.* at 459. Despite his misgivings about the wide use of the "virtual representation" doctrine utilized by the Eighth Circuit majority, Judge Henley stated as follows:

> I believe that on the facts here, the requirements of "notice" and "sufficient representation" were satisfied. In particular, the plaintiffs in the second suit clearly were on notice of the first litigation, because some of them had also been plaintiffs in the prior suit. Moreover, the same counsel represented plaintiffs in both actions. I believe that this identity of counsel and (at least some of the) plaintiffs also suggests that the "sufficient representation" requirement of due process was met. In addition, as the panel opinion points out, it appears that the principal reason for filing the second suit was to evade the judgment in the first suit.

Id.

This Court views *Tyus*, in both the majority and concurring opinions, as positive support for the preclusion of the federal "Gill-net" suit. The majority in *Tyus*

adopts the widest possible use of "virtual representation" for finding preclusion through privity, and such a position may or may not be appropriate. However, considering the tempering language employed by the concurrence, the result in *Tyus* certainly can be paralleled to the result that this Court has reached in the "Gill-net" suit. The *Tyus* factors clearly sustain the conclusion reached by this Court in its Initial Decision. However, the Court will now examine two more cases that have thoroughly addressed "virtual representation," each of which held that res judicata should not have been employed to bar the second suit.

(ii) *Bittinger v. Tecumseh Products Company*

In this second suit challenging the defendant's termination and restructuring of the insurance benefits of a group of retired hourly workers of the defendant, Tecumseh Products Company (hereinafter, "Tecumseh"), an individual (Charles Bittinger) sought relief through a proposed class action under ERISA and the Labor-Management Relations Act. *Bittinger*, 123 F.3d at 879.

Originally, when the defendant company altered the insurance benefits provided to this group of retired hourly workers, the retirees organized a response by meeting and subsequently forming a non-profit corporation aimed at the " 'unification of approximately 1200 hourly retirees from [the company] to seek legal advice for the reinstatement of promised benefits.' " (hereinafter, the abbreviation "UTPHR" will be used to refer to the organization, "Unified Tecumseh Products Hourly

Retirees"). *Id.* Eventually, three of the organization's individual members brought a lawsuit (styled as a class action) against Tecumseh. *Id.* The organization (UTPHR) basically coordinated the first lawsuit – creating mailing lists, holding meetings, dealing with attorneys, and collecting money from its members (including *Bittinger*, the named plaintiff in the second suit, who contributed $20 several times) to support the activities of the organization, including the litigation of the first suit. *Id.* However, early on in the first suit, the court granted Tecumseh's motion for summary judgment and dismissed the action without a trial. *Id.* Because the case was dismissed before the class action issue was reached, the proposed class of retirees was never certified. *Id.*

Subsequently, Charles Bittinger brought this second suit as named plaintiff, seeking to have the same group of retirees (minus the three named individuals in the first suit) certified to have the same claims against Tecumseh relitigated. *Id.* The district court certified the class, then dismissed the suit, reasoning that the claims were barred under the doctrine of res judicata. *Id.* Although *Bittinger*, among other things, admitted that he would have been included in the class proposed by the first suit, actually contributed money to the maintenance of the first suit, and signed an affidavit in support of the first suit, the Sixth Circuit Court of Appeals, in a majority opinion, reversed the district court's application of res judicata and reinstated the second suit. *Bittinger*, 123 F.3d 877.

Citing to *Richards* the Sixth Circuit applied a narrow reading of that Supreme Court decision to support its reversal of the district court's decision and its rejection of "virtual representation" in this context. *Id.* at 880-882.

Although the Sixth Circuit recognized *Richards'* approval of the "adequate representation" category for finding privity, the Sixth Circuit distinguished "adequate representation" from the broad notion of "virtual representation," such as that utilized in the majority opinion in *Tyus*. *Id.* While this Court is unable to distinguish in what manner the Sixth Circuit views the terms "adequate representation" and "virtual representation" as different, our interpretation of *Bittinger* is that it did not seem to recognize that which the other courts refer to as "virtual representation" or "adequate representation" as a category for finding privity.[9] Nonetheless, the Sixth Circuit expressed a strong preference for strict traditional rules in this area of res judicata, rather than the more fact-intensive inquiry into the equities of the case, as adopted by the court in

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[9] However, the Sixth Circuit seems to point to § 41 of the Restatement (Second) as the guideline for the categories of situations where privity between parties may be found. *Id.* at 880. Although the Sixth Circuit mentions *Richards'* approval of "adequate representation," the remaining portions of the opinion discuss "virtual representation" and the Sixth Circuit's disapproval of its use to extend the application of res judicata. The decision in *Bittinger*, which is attempting to determine "whether under the doctrine of 'virtual representation' res judicata should be expanded to cover plaintiffs who were not parties or in 'privity' with a party in a previous action," must be distinguished from *Tyus*, which treats "virtual representation" (*i.e.*, "adequate representation") as simply a category for finding privity. *Id.* at 879. Also, the dissent in *Bittinger* states as follows: "the majority erroneously concludes that § 41 [of the Restatement (Second) of Judgments] establishes a minimum threshold for finding privity. However, . . . the Supreme Court has indicated that § 41 is but one example of privity, and that, in addition, adequate representation will also suffice." *Id.* at 888 (citing *Richards*, 517 U.S. 793, 116 S.Ct. 1761, 135 L.Ed.2d 76).

Tyus. *Id*. at 881-882. Moreover, the Sixth Circuit signaled its concern about the requirements of FRCP 23 in such instances, whereby a broad application of a separate "virtual representation" doctrine may create an end-run around the limitations of FRCP 23. *Id*. at 882.

However, as in *Tyus*, there is a dissent to the majority opinion in *Bittinger*. Judge Ryan refers to the strong alignment of interests between the named plaintiffs in the two suits and their reliance on the organization (UTPHR) created for the sole purpose of helping to resolve through litigation the complaints of these former hourly workers of Tecumseh. *Id*. at 885-890. Moreover, like the court in *Tyus*, the dissent here uses the terms "virtual representation" and "adequate representation" interchangeably. *Id*. In his support of a finding of privity through virtual representation,[10] Judge Ryan points to several factors which promote the application of res judicata through privity: the strong alignment of interests of the former hourly workers, including their creation of and control over UTPHR; the fact that UTPHR authorized the filing of, financed and controlled both suits (including the hiring of attorneys); the fact that the claims in the two suits were virtually identical; and, the fact that *Bittinger* himself, the lead plaintiff in the second suit, contributed money to UTPHR and even participated in the first suit (most expressly, through the signing of a supportive affidavit). *Id*.

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[10] This view is distinguished from that of the majority, which seemed to view virtual representation as something other than a category for finding privity.

Based on these facts, the dissent asserts that "UTPHR is precluded from relitigating claims it has already lost; it should not be able to escape the effects of res judicata merely by naming a different plaintiff."[11] *Id.* at 887. The dissent points to a leading commentator on this subject, which has stated, " 'It seems clear enough that an association should not be able to evade preclusion continually by averring that unidentified members are not bound and bringing successive suits by claiming injury to different identified members.' 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4456."[12] *Id.*

It must be noted that the dissent points to two instances, at least one of which must be satisfied in order for adequate representation to apply. These two instances are (1) legal accountability and (2) acquiescence to representation. *Id.* at 887. The second instance, being more pertinent to the "Gill-net" matter, was explained as follows by the dissent:

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[11] Like *Tyus*, the dissent here distinguishes the facts of *Richards* in that the plaintiffs in the second suit in *Richards* had no notice of the first suit and in that the party to the first suit and the nonparty allegedly bound in the subsequent suit were "mere 'strangers.' " *Id.* at 888.

[12] However, the dissent does limit this language in its discussion of FRCP 23, when it suggests that someone participating in such a litigation group could simply file separately to preserve his claims. *Id.* at 889. This Court has concern over that point when tactically maneuvered plaintiff(s) in a stayed second suit are awaiting the outcome of the first suit, the positive outcome of which will directly benefit those plaintiffs.

> The final strain of virtual representation is that of acquiescence. "A person having a claim or defense paralleling or related to other litigation may agree that the outcome of the other litigation will be determinative of the issues in his case. . . . An agreement to be bound by the result of another action . . . may be implied from conduct and manifestations of intention." Restatement (Second) of Judgments § 40 cmt. a.

Id. at 888-889. Giving an example of acquiescence, the dissent cited to *Cauefield v. Fidelity and Casualty Co. of New York*, 378 F.2d 876 (5th Cir.1967), a case where

> nonparties had acquiesced to a judgment in light of the fact that their federal case had been continued in order for a state case, the result of which ultimately bound them, to be resolved. As the Fifth Circuit later pointed out in discussing *Cauefield*, the preclusive effect of the state court proceeding on the federal litigants arose out of a "tacit agreement" to "resolve all the numerous identical claims" in state court. Benson and Ford, 833 F.2d at 1176.

Id. at 889. This Court has previously cited to *Cauefield* as support for the application of res judicata to the "Gillnet" matter. *See* "Initial Decision." The dissent, having found both legal accountability and acquiescence, along with the other factors mentioned above, believed that res judicata should have barred the second suit in this case.

This Court views *Bittinger* as very limited in its recognition of "virtual representation" as a category for finding privity. It appears that the majority does not view "virtual representation" as such a category at all. This Court does not believe that *Richards* suggests such a strict

result. However, the dissent in *Bittinger* is more faithful to the current trend of treating "virtual representation" as a category of finding preclusion through privity. A decision this Court believes to be more in line with *Richards* and a narrow view of *Tyus* is *Tice v. American Airlines*, 162 F.3d 966 (7th Cir.1998).

(iii) *Tice v. American Airlines*

This case involved a later suit by American Airline pilots challenging American's practice of forcing pilots to retire when they turned 60 years of age. *Tice*, 162 F.3d at 968-970. There had been previous suits challenging American's policies towards the "flight officer" position.[13] *Id.* One of those previous suits was brought by a group of

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[13] The "flight officer" position is the third position on an airplane, which American used as a training position for future pilots and co-pilots. The problem here arose because the Federal Aviation Administration (FAA) instituted a rule that no person may serve as a pilot if that person has reached the age of 60. Therefore, American would only hire and retain younger people in the "flight officer" position, so that once those individuals had trained for a time in the "flight officer" position, they could advance to pilots or co-pilots (referred to as American's "up-or-out" policy). Different groups were upset with this policy, namely older individuals seeking employment with American, who were not young enough in American's eyes to be able to sufficiently train as "flight officers," and then still be young enough to have a career as a pilot or co-pilot. Another group that opposed American's policy were current pilots or co-pilots for American, that were going to be forced to retire at the age of 60, because the only position available to them would be that of "flight officer." However, as stated earlier, that position was reserved for younger individuals as a training tool for advancement.

individuals who had not been hired by American due to American's "up-or-out" policy. *Id.* The other was brought by a group of older pilot and co-pilots who were significantly affected by American's "up-or-out" policy. *Id.* However, the group in the *Tice* suit is distinguishable from both of the previous groups. One of the first groups was comprised of individuals who had not been hired by American because of their age (not current employees being forced to retire). *Id.* The other group, while being very similar to the *Tice* group, cannot be seen as having been adequately aligned with the *Tice* group because their interests diverged at the time of the previous suit (the plaintiffs in the *Tice* suit were not even eligible to join the previous litigation because they were too young at the time; furthermore, their interests at the time of the previous suits actually diverged from those of the first employee plaintiffs, because the forcing out of older employees can be seen as directly benefiting younger employees). *Id.* The Seventh Circuit rejected the application of res judicata here because there was not an adequate alignment of interests between the different groups sufficient to justify a finding of privity through "virtual representation" (or "adequate representation").

While the Seventh Circuit did not find preclusion through privity in this case, the court did view "virtual representation" as a tool for determining the presence of privity. *Id.* at 971. The court stated that privity through virtual representation could be found by determining whether there was a sufficiently close identity of interests between the parties such that the application of res judicata would be appropriate. *Id.* Moreover, the Seventh Circuit recognized the factors utilized by the court in

Tyus, and stated that a court applying these factors is attempting in reality "to determine the answer to the real (fact-specific) question – whether there was (or should be implied at law) the kind of link between the earlier and later plaintiffs that justifies binding the second group to the result reached against the first." *Id.* The court identified this question as identical to "the crux of the privity inquiry." *Id.* Applying the "virtual representation" inquiry to the facts of this case, the court held that the alignment of interests of the group in *Tice* were insufficient for privity to be found in this case. Also, the court made a special point of noting that there was no evidence of "manipulative litigation practices" here, a factor that the *Tyus* court considered heavily when barring the second suit in that litigation. *Id.* at 973.

Once again, the concerns over the interplay of "virtual representation" with the requirements of FRCP 23 were raised in *Tice*. *Id.* at 972-973. The court noted that compliance with the formal requirements of FRCP 23 is enough in itself to comply with due process and to justify binding later parties to earlier results. *Id.* at 972. However, the court states that without such formal compliance, "normal privity analysis must govern whether nonparties to an earlier action can be bound to the result." *Id.* 972-973. The court cited to familiar privity factors to be applied in that situation such as alignment of interests, the role the absentees played in the first suit (including awareness and participation), and the similarity of claims or defenses. *Id.* at 973.

Unlike *Bittinger*, *Tice* recognizes "virtual representation" as a category for finding preclusion through privity. The court here denied application of res judicata because

the parties to the second suit were not sufficiently aligned in their interests to the parties bringing the previous suits. The court examined the appropriate factors and simply found that they were not present in this situation. Similar to *Tyus* and the dissent in *Bittinger, Tice* gives more appropriate consideration to using "virtual representation" as a tool for finding privity.

D. CONCLUSIONS

This Court, having examined the case law derived from *Richards*, including the concept of using "virtual representation" to find preclusion through privity, hereby reaffirms its Initial Decision barring the federal "Gill-net" suit under the doctrine of res judicata. As the Court has stated previously, the federal court plaintiffs were so aligned with the state court plaintiffs as to justify preclusion. All the petitioners involved here shared the same concern – the ability of the commercial fisherman to pursue their trade through the use of "gill-nets." The same lead plaintiff instituted both the state and federal suits. Moreover, the claims at issue here were identical in both suits. The federal court plaintiffs even proposed submitting the state court record as the sole basis for this Court to reach its decision. Furthermore, considering the overlap of plaintiffs between the two suits, the fact that the lead plaintiff in the two suits were the same, the use of the same counsel in both suits, and the participation of some of the federal plaintiffs in the state court suit, this Court finds it impossible to conclude that the federal plaintiffs were not on notice of the state court suit as one that could determine their legal rights. As in *Cauefield*, acquiescence to the preclusive effect of the state court suit

can be implied from conduct and manifestations of intention. The federal plaintiffs certainly expected to benefit from a positive ruling in state court; therefore, they should not be allowed to suffer no ill effects from a negative ruling.

Moreover, the tactical maneuvering employed by federal plaintiffs should not allow them to evade the state court ruling on the constitutionality of this Louisiana legislation. The coordinated efforts of the commercial fisherman and their representative associations in bringing two different suits in state and federal court, hoping to dodge res judicata by merely naming different plaintiffs with the same interests, cannot escape the concept of preclusion through privity.

The federal plaintiffs insist that they opted out of the state court suit by instituting their own action in federal court. But, essentially, these two actions were the same. The same lead plaintiff in the state court suit filed the federal court suit. The two sets of plaintiffs asked for the exact same class to be certified, while bringing the exact same claims. The overlap in plaintiffs, along with the evidence of tactical maneuvering (not to mention the federal plaintiffs' request to submit the state court record as their case in this Court), make it very difficult for this Court to see how the federal plaintiffs did not at least implicitly acquiesce to the state court determination here. Notwithstanding the language in *Williams v. State*, 350 So.2d 131, 138 (La.1977) (indicating that through the filing of a separate suit, plaintiffs included in the definition of the class "presumably" opted-out of the class action), this Court believes that the issue presented to it here is an issue of first impression under Louisiana law. Under class

action rules, this Court cannot conceive how the federal plaintiffs were not on notice of the pendency of the state court suit as one that might determine their rights. Furthermore, there was clearly an opportunity for the federal court plaintiffs to participate in the state court suit, as evidenced by some of them doing so. Regarding the argument that the federal plaintiffs opted-out, this Court views the filing of the federal court suit as an impermissible way for these coordinated plaintiffs to take another bite at the apple, rather than opting out of the class action. Under such circumstances, this Court does not believe that the federal court plaintiffs validly avoided the state court ruling.

However, if the procedures of the state court with regard to the class action device are seen as faulty, then perhaps the best way to dispose of this issue is through a pure privity analysis (which this Court has already done). As suggested in *Tice*, without formal compliance with class action requirements, the normal privity analysis must govern. *Tice*, 162 F.3d at 972-973. As this Court has delineated, under a normal privity analysis, the federal plaintiffs are surely precluded.

Finally, this Court points to the reasoning employed in its Initial Decision and adopts it here to the extent that it is consistent with this opinion. That reasoning strengthens this Court's decision to bar the federal plaintiffs' claims through the doctrine of res judicata.

Accordingly,

IT IS ORDERED that the plaintiffs' motion for a new trial is hereby **DENIED**.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-30790

LOUISIANA SEAFOOD MANAGEMENT COUNCIL INC; JOHN THOMPSON; EDDIE LEJUINE; MATTHEW REAGAN; CLARA GERICA; TODD STIPELCOVICH; BARRY SCHAFERKOTTER; DAVID MILLS; CHRISTON CHERAMIE; PETER STEVEN HOTOPH; EUGENE HICKMAN; CHAD LAY; LINDBERG SANTINI; NED F MALLEY, JR; BARISICH INC

Plaintiffs - Appellants

– v.

MURPHY J FOSTER, JR, Governor; RICHARD P IEYOUB, Attorney General; JOE HERRING; CHARLES CLARK; PETER VUJNOVICH; JOHN F SCHNEIDER; PERRY GISCLAIR; DANIEL BABIN; JOSEPH P CORMIER; GLYNN CARVER; WYNTON VIDRINE; LOUISIANA WILDLIFE AND FISHERIES COMMISSION; LOUISIANA DEPARTMENT OF WILDLIFE AND FISHERIES;

Defendants - Appellees

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 12/11/00, 5 Cir., ___, ___ F.3d ___)

(Filed Jan. 09, 2001)

Before POLITZ, SMITH, and PARKER, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge